

**NCR Corporation and Communications Workers of America, Local 4900, AFL-CIO. Case 9-CA-30321**

November 26, 1993

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

The issue in this case is whether the judge correctly found that the Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad no-solicitation/no-distribution policy.<sup>1</sup> The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, NCR Corporation, Dayton, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> On September 15, 1993, Administrative Law Judge Marvin Roth issued the attached decision. The Respondent filed exceptions and a supporting brief.

*Vyrone Cravanas, Esq.*, for the General Counsel.  
*Timothy Butler, Esq.*, of Dayton, Ohio, for the Respondent.  
*Barbara J. Baird, Esq.*, of Indianapolis, Indiana, for the Charging Party.

**DECISION**

**STATEMENT OF THE CASE**

MARVIN ROTH, Administrative Law Judge. This case was heard at Dayton, Ohio, on June 17, 1993. The charge was filed on December 11, 1992, by Communications Workers of America, Local 4900, AFL-CIO (the Union).<sup>1</sup> The complaint, which issued on February 19, 1993, alleges that NCR Corporation (the Company or Respondent) violated Section 8(a)(1) of the National Labor Relations Act. The gravamen of the complaint is that the Company allegedly unlawfully maintained a policy prohibiting employees from distributing materials including union-related material, in the dormitory area of its Dayton, Ohio technical education center training facility, and applying that policy by confiscating union literature from an employee and by advising him not to distribute union literature in that area. The Company's answer denies the commission of the alleged unfair labor practices. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. The General Counsel, the Union, and the Company each filed a brief.

<sup>1</sup> All dates are for 1992 unless otherwise indicated.

On the entire record in this case and from my observation of the demeanor of the witnesses, and having considered the briefs and arguments of the parties, I make the following

**FINDINGS OF FACT**

**I. THE BUSINESS OF THE COMPANY**

The Company, a corporation, is engaged in the sale, installation, and servicing of computer and related equipment at its Dayton, Ohio facility. In the operation of its business, the Company annually purchases and receives at its Dayton, Ohio facility goods valued in excess of \$50,000 directly from points outside of Ohio. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

**II. THE LABOR ORGANIZATION INVOLVED**

The Union is a labor organization within the meaning of Section 2(5) of the Act.

**III. ALLEGED UNFAIR LABOR PRACTICES**

**A. The Facts**

The Company maintains a training facility at Miamisburg, near Dayton, Ohio, known as C-TEC. The facility, which opened in 1970, is a large complex of interconnected buildings, including training areas, an administration building, a cafeteria which seats 500 persons, and seven 2-story dormitory buildings. The training areas comprising five buildings including the administration building, are open and functioning from 8 a.m. to 5 p.m. At other times trainees normally do not have access to the training areas. The cafeteria, located between the training areas and dormitory buildings, is open around the clock. Each dormitory building contains, on each floor, 30 to 32 small individual residence rooms (with 2 rooms each sharing a bathroom), a recreation area, and a lounge area. Residence room floors are covered with "indoor-outdoor" type carpeting. The dormitories have a total of 370 residence rooms.

At irregular intervals, and for varying periods of time, the Company assigns employees from throughout the United States, and some from other countries, for training at C-TEC. Most are field engineers, who repair computer equipment. Some are sales trainees. The majority are company employees, the others being employees of company contractors. Some are supervisory personnel. Most of the Company's district offices, and consequently most attendees at C-TEC, are not represented by any labor organization. However, some of the field engineers are in represented units, including units represented by unions other than Communications Workers of America (CWA). Typically, 5 to 10 percent of attendees are from other countries.

Zef Bazan, whose title is manager of finance and administration, has been in charge of C-TEC since 1975. The Company has a staff of about 100, including instructors, developers, and administrative engineering, shipping and receiving, and data center personnel. Through a security service (in November 1992, Allied Security Service), the Company provides security at the facility. There is guard service in the dormitory area. The Company has also contracted with Marriot Corporation to operate the dormitories and cafeteria. Marriot's housekeeping staff cleans rooms between 9 a.m.

and 3 p.m., when attendees are in class, in a manner similar to that of a hotel staff. However, as indicated by the evidence in this case, the Company, through Bazan, retains control over the facility, including security policy.

The overwhelming majority of attendees, who are not based in the Dayton area, live in the dormitories while attending C-TEC. If there is an overflow, then some may be placed in nearby motels. However, visitors are permitted in the dormitories, and those attendees who are not living at the facility have access to the dormitory buildings during early evening hours.

Field engineer Gary Taylor, the General Counsel's principal witness, works out of the Company's district office in Indianapolis, Indiana, about 170 miles from Dayton. Taylor testified that he has attended C-TEC some 14 or 15 times since 1974. Taylor attended C-TEC at a session from November 10 to 20, 1992, when the events which gave rise to this case occurred. Taylor testified that during his November 1992 session the dormitories appeared to be substantially full, because some attendees were placed in motels. Manager Bazan, the Company's only witness, testified that the facility had an average of 300 students weekly, and there had been no overflow housing condition since 1991.

When attendees arrive at C-TEC, they check in at a registration desk between the cafeteria and the dormitories, where they are given registration materials. Normally they would not have occasion to return to the desk except to request information or pick up their mail, which is placed in nearby mail slots. Since 1989, when the dormitories underwent a major renovation, each residence room has a telephone. There are at least six bulletin boards located either near the registration desk or in the dormitory buildings. However, one is reserved for official information and two are glass covered.

The Company's field engineers report to their respective district offices. However, they are assigned a specific area and customers, and normally operate from their homes. Typically they come to the district office only to attend monthly meetings or to make pickups or dropoffs, usually about once a week.

In late 1991 and early 1992, the Union (the Indianapolis local of CWA) conducted an organizational campaign among the Company's field engineers assigned to the Indianapolis district office. A representation election was conducted on March 9, 1992. The Union lost the election. However, the Union continued to engage in organizational activity among the Company's field engineers.

Field engineer Taylor testified in sum as follows: He is a member of the Union's organizing committee. While at C-TEC in November 1992, he engaged in organizational activity. Specifically, he distributed union literature to persons in the dormitory hallways, in lounge and recreation areas, and at residence rooms. If a residence room door was open, he would offer the literature to the occupant. If the door was closed, he would slip the literature (a pamphlet) under the door. When the door was closed, he did not know whether the room was occupied, or by whom. He sometimes put literature on the bulletin boards, but the literature was usually removed, although he does not know by whom. He did not distribute literature in the cafeteria, because he heard there might be problems. He usually distributed literature after 5 p.m., i.e., after classes had adjourned for the day. To Tay-

lor's knowledge, no company agent observed him until the event which gave rise to this proceeding.

Roger Runyan, the General Counsel's other witness, is a field engineer operating out of the Company's Dayton district office. Runyan testified in sum that on several occasions he has distributed union literature at C-TEC in a manner similar to that of Taylor's. To his knowledge, he was not observed by any company agent.

Taylor further testified in sum as follows: On November 19, at about 9:40 p.m., he was distributing union pamphlets in one of the dormitories, from room to room, when stopped by Jeff Wilder, a security guard. Wilder told Taylor that he needed permission to distribute the pamphlets, and confiscated them. The following day (the last of his stay) Taylor was told to report to Manager Bazan's office. Bazan said that Taylor was caught distributing pamphlets in the dorm, and asked if he had read the "memo" he received at the dorm. Taylor said he had not received such memo. Bazan then handed him a company memo dated February 11, 1992, which read as follows:

Subject: NON SOLICITATION AND DISTRIBUTION POLICY  
This memo is to restate NCR's "Non Solicitation and Distribution Policy."

NCR HAS PROVIDED BULLETIN BOARDS FOR THE DISPLAY OF INFORMATION AND PRINTED MATERIAL. NCR RESERVES THE RIGHT TO REMOVE INFORMATION AND PRINTED MATERIAL FROM BULLETIN BOARDS WHICH CONTAINS OFFENSIVE LANGUAGE OR HAS BEEN POSTED MORE THAN 7 DAYS. NCR WANTS TO MAINTAIN THE PROFESSIONAL DECOR OF THE FACILITY AND THEREFORE, INFORMATION AND PRINTED MATERIAL IS NOT TO BE DISPLAYED ON THE OUTSIDE (HALLWAY) SURFACE OF RESIDENCE DOORS, OR LEFT UNATTENDED IN THE PUBLIC AREAS OF THE DORM OR *in other areas of the TEC facility*. ANY EMPLOYEE VIOLATING THIS POLICY WILL BE ASKED TO CEASE THE VIOLATION. A SECOND VIOLATION WILL RESULT IN FURTHER DISCIPLINARY ACTION AS APPROPRIATE.

PERSONS WHO ARE NOT EMPLOYEES OF NCR CANNOT SOLICIT OR DISTRIBUTE PRINTED MATTER FOR ANY PURPOSE ANYWHERE ON CORPORATE PROPERTY. EMPLOYEES ARE NOT PERMITTED TO SOLICIT FOR ANY REASON DURING WORKING TIME.\* EMPLOYEES ARE NOT PERMITTED TO DISTRIBUTE PRINTED MATTER FOR ANY PURPOSE DURING WORKING TIME OR DURING NONWORKING TIME IN WORKING AREAS.

WORKING TIME DOES NOT INCLUDE BREAK PERIODS AND/OR MEAL TIMES.

Bazan told Taylor that he needed Bazan's permission to distribute any kind of literature, and that Bazan in turn would need approval from his superiors. Taylor answered that he had a right under Federal law to organize in a nonwork area at a nonworktime. Bazan replied that if Taylor was caught again disciplinary action would be taken against him.

Manager Bazan testified in sum as follows: The February 11 memo was included in a packet of information given to each student at registration, and was a statement of company policy. There were three reasons for the rule prohibiting employees from leaving information and printed material "unat-

tended”: (1) “general housekeeping,” (2) safety, because a person could slip on paper passed under a residence room door, and (3) because general distribution would not be “of interest to everyone with our varied backgrounds.” Bazan could not think of anything, other than a company notice, which would be of interest to all. The Company has given notice of presentations through the mail slots. To his knowledge, no mass distributions have been permitted at C-TEC. Bazan refused to permit the Gideon Society to distribute Bibles because of the varied religious backgrounds of the Company’s students.

Bazan further testified in sum as follows: His meeting with Taylor was informational rather than disciplinary. He did not warn Taylor not to let it happen again. He told Taylor that if he wanted to do it again he should see Bazan and request permission. Bazan would then seek advice from the company employee relations department. Bazan had to seek such advice if the distribution “did not pertain to all residents.”

Field engineers Taylor and Runyan testified in sum as follows: It was a common practice to slip communications and other material, such as computer discs, printouts, or magazines under a residence door if the recipient could not be located. However, this was done on an individual basis rather than as part of a general distribution. Before the Company installed telephones in the residence rooms, messages concerning telephone calls were passed in this way. However, they were not aware of any general distribution of written material other than their union activity.

#### B. Analysis and Concluding Findings

In light of Bazan’s testimony, it is evident that the Company interprets and applies its “Non Solicitation and Distribution Policy” as to prohibit all general distribution of union literature at C-TEC, including person-to-person distribution. As indicated, Bazan testified that the rule was promulgated in part to preclude distribution of literature which was not of interest to all attendees, and that except for company notices, he could not think of anything which would be of such interest. Bazan also testified that he did not warn Taylor not to distribute literature again without permission. However, the memo which Bazan handed to Taylor stated that “a second violation will result in further disciplinary action as appropriate.” Therefore, it is immaterial whether Bazan verbally warned Taylor of future discipline.

It is settled law that an employer rule which prohibits employees from engaging in union solicitation during nonworktime, or distribution of union literature during nonworktime and in nonwork areas, is presumptively unlawful in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline. *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322, 324 (1974). The dormitory buildings, cafeteria, and adjacent hallways of C-TEC are nonwork areas of that facility, and the employees who attend that facility are entitled to the employee rights of union solicitation and distribution as defined in *Magnavox*. Those rights also extend to employees of company contractors who attend the facility. See *Southern Services*, 300 NLRB 1154, 1155 (1990), enf. 954 F.2d 700 (11th Cir. 1992). I find, without merit, the Company’s argument (Br. 14–15) that students at the facility should be regarded as nonemployee “resident-guests,” and entitled only

to the rights of nonemployee union organizers, as defined in *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992), and *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). C-TEC is a place of work for the attendees, who are there pursuant to and as part of their employment, and C-TEC is a workplace operated by and under the Company’s control. Therefore, *Magnavox* is applicable to the present case.

Therefore, it follows that the Company’s no-distribution policy, on its face and even more so as interpreted and applied by Bazan, is presumptively unlawful, in the absence of the limited conditions defined in *Magnavox*. The reasons advanced by the Company for its policy fall well short of demonstrating those conditions.

The Company’s assertion that it may lawfully prohibit distribution of union literature as not of interest to all C-TEC attendees is patently without merit. The right of employees to distribute union literature during nonworktime and in nonwork areas is not limited only to distribution to prospective union members. Employees have a statutorily protected right to solicit sympathy, if not support, from the general public, customers, supervisors, or members of other labor organizations.

The Company’s other professed reasons for its no-distribution rule fail as a threshold matter because they are based on surmise and speculation rather than demonstrated need. As indicated, *Magnavox* requires that the employer come forward with evidence that the rule is necessary to maintain production or discipline. Thus in *Korn Industries v. NLRB*, 389 F.2d 117, 124–125 (4th Cir. 1967), cited by the Company (Br. 12), the court upheld a no-distribution rule because the rule was enforced only in the employer’s factory area, and the employer presented evidence that distribution in the factory area could cause a fire hazard. In *Erie Marine, Inc.*, 192 NLRB 793 (1971), also cited by the Company, the employer operated a shipbuilding plant where welding torches and similar equipment was used. The Board held that the employer could lawfully maintain a rule prohibiting distribution of literature “in such a manner as to litter the plant.”<sup>2</sup> In the present case, the Company’s rule, both on its face and as enforced, applied to the entire C-TEC facility, and was not limited to distribution which caused litter to the facility. No evidence was presented that employee distributors sought to or did throw “thousands of pieces of paper in the air” or toss “shredded confetti” in the residence rooms (R. Br. at p. 11). In this regard, it is significant that although the Company contracted housekeeping functions to Marriot, an outside firm, no evidence was presented that Marriot or its housekeeping staff ever complained that distribution of union literature posed any particular problem. As indicated, Marriot’s staff routinely cleaned and serviced all residence rooms in a manner similar to that performed in a hotel. It is evident that in those few instances where Taylor or another employee distributor may have placed a union pamphlet in an unoccupied room, Marriot’s staff could and would simply remove the pamphlet in the course of their housekeeping functions.

<sup>2</sup> *Gemco*, 271 NLRB 1190 (1984), also cited by the Company (Br. 7) is inapposite. That case involved a retail store. As the selling floors, i.e., “public areas” of the store were working areas, the employer could lawfully prohibit distribution of literature in such areas, and the Board so held.

An overly broad no-distribution rule is invalid regardless of the employer's motivation in promulgating or enforcing such rule. However, a facially valid rule may be unlawful if applied in a discriminatory manner. In this regard, it is also significant that the Company, rather than Marriot, invoked the rule for alleged "general housekeeping" and "safety" considerations. In *New Process Co.*, 290 NLRB 704, 720 (1988), the Board found evidence of unlawful motivation, where an employer supervisor, rather than a person normally engaged in cleanup work, removed union leaflets which were allegedly left "helter-skelter" on breakroom tables.

With regard to the Company's alleged "safety" consideration, the Company's comparison of the C-TEC dorms to a hotel or motel is enlightening. It is a common practice in many hotels and motels to slip copies of bill statements, complimentary newspapers, or other papers under room doors, without prior notice to the occupant. Although both employees Taylor and Runyan had been distributing union literature in the dorms for some time prior to November 19, the Company presented no evidence that any occupant had ever complained of an accident or near accident. Indeed, the Company's argument in this regard, when considered in light of the nature of the occupants' work, borders on the frivolous. It is evident that persons engaged in the work of repairing computer equipment are accustomed to the possibility of paper lying about on the floor.

The Company's no-distribution rule was also unlawful in another respect. As indicated, the Company generally permits attendees to post material on some bulletin boards in the dormitory areas. However, under the rule, the Company "reserves the right to remove information and printed material from bulletin boards which contains 'offensive language.'" What constitutes "offensive language" is a matter of subjective interpretation. In *Great Lakes Steel v. NLRB*, 625 F.2d 131 (6th Cir. 1980), the court held as overly broad and unlawful, an employer rule that: "No employee is permitted to bring in or distribute, at any time on Company property, literature which is libelous, defamatory, scurrilous, abusive or insulting or any literature which would tend to disrupt order, discipline or production within the plant." In the present case, the term "offensive language" could be interpreted by the Company or employees as applying to union literature. Therefore, in this regard the rule was overly broad and unlawful.

I further find that the Company, by its agent, unlawfully confiscated union literature from Taylor. Even if the Company's no-distribution rule were valid, the Company had no legitimate basis for taking such action.

In sum, I find that the Company's "non solicitation and distribution policy" was overly broad and unlawful, and that the Company acted unlawfully by maintaining and enforcing that policy, telling Taylor not to distribute union literature in the dormitory area, and confiscating such literature from Taylor. The Company thereby violated Section 8(a)(1) of the Act.

#### CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(5) of the Act.

#### REMEDY

Having found that the Company has committed violations of Section 8(a)(1) of the Act, I shall recommend that it be required to cease and desist therefrom and from like or related conduct, and to take affirmative action designed to effectuate the policies of the Act, including posting of appropriate notices.

I shall recommend that the Company be ordered to rescind its "non solicitation and distribution policy." I agree with the Union that in view of the unique nature of the C-TEC operation, a conventional 60-day-notice posting at the facility would be inadequate notice to the Company's field engineers, scattered throughout the United States, who would have an interest in and whose rights would be defined by the remedial Order. I also agree that it would be difficult to monitor compliance with a requirement that the Company be ordered to post notices at each of its district offices. However, I also find that it would be unduly burdensome, and out of proportion to the violations found, to require the Company to mail copies of the notice to its field engineers nationwide. I find, in the circumstances, that an appropriate remedy would be to extend the posting at C-TEC to a period of 1 year. Although as the Union points out, field engineers are not necessarily sent for training every year, such a posting period should be sufficient to afford substantial dissemination of notice to interested and affected employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>3</sup>

#### ORDER

The Respondent, NCR Corporation, Dayton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees, including employees of subcontractors, from distributing union literature during nonworktime and in nonwork areas, including the dormitory area of its technical education center training facility (C-TEC).

(b) Discriminatorily prohibiting posting of union literature in nonwork areas.

(c) Confiscating union literature in nonwork areas.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

<sup>3</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Rescind and cease distribution of its “Non Solicitation and Distribution Policy.”

(b) Post at its C-TEC facility copies of the attached notice marked “Appendix.”<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent’s representative, shall be posted by Respondent immediately on receipt and maintained continuously for 1 year in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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<sup>4</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

## APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT prohibit employees, including employees of subcontractors, from distributing union literature during nonworktime and in nonwork areas, including the dormitory area of our technical education center training facility (C-TEC).

WE WILL NOT discriminatorily prohibit posting of union literature in nonwork areas.

WE WILL NOT confiscate union literature in nonwork areas.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind and cease distribution of our “Non Solicitation and Distribution Policy.”

NCR CORPORATION